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4 RICHARD ROGERS,
5 Plaintiff,
6 v.
7 POSTMATES INC.,
8 Defendant.

9 Case No. [19-cv-05619-TSH](#)
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12 **ORDER RE: MOTION TO DISMISS**

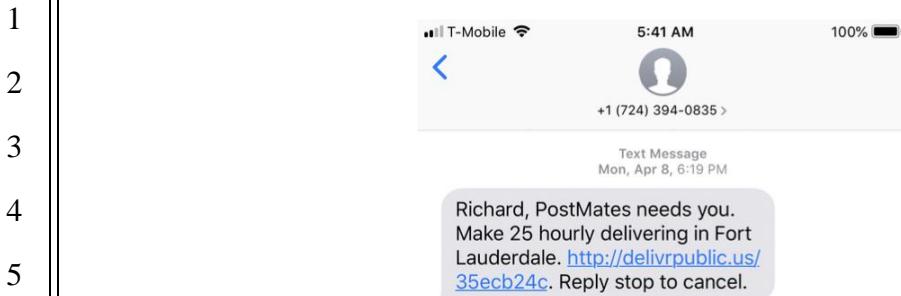
13 Re: Dkt. No. 26

14 **I. INTRODUCTION**

15 Plaintiff Richard Rogers brought this action under the Telephone Consumer Protection Act
16 after receiving an unsolicited text message on his cellular phone with a hyperlink directing him to
17 a job board on Postmates' website. Pending before the Court is Defendant Postmates' Motion to
18 Dismiss pursuant to Federal Rule of Civil Procedure ("Rule") 12(b)(2). ECF No. 26. Plaintiff
19 filed an Opposition (ECF No. 30) and Defendant filed a Reply (ECF No. 31). The Court finds this
20 matter suitable for disposition without oral argument and **VACATES** the March 5, 2020 hearing.
21 *See Civ. L.R. 7-1(b).* Having considered the parties' positions, relevant legal authority, and the
22 record in this case, the Court **GRANTS** Defendant's motion for the following reasons.

23 **II. BACKGROUND**

24 Rogers initiated this putative class action against Postmates on September 6, 2019.
25 Postmates operates a for-profit mobile app "Urban Logistics platform [which] connects customers
26 with local couriers who can deliver anything from any store or restaurant in minutes."
27 <https://postmates.com/about> (last visited February 26, 2020). Rogers alleges that on or about
28 April 8, 2019, he received the following unsolicited text from the dedicated number (724) 394-
0835:



First Amend. Class Action Compl. (“FAC”) ¶¶ 12, 13. Rogers alleges that at the time he received the message, the hyperlink in the message (<http://delivrpublic.us/35ecb24c>) directed him to the following URL when accessed¹, *id.* ¶ 14:

https://fleet.postmates.com/?utm_source=birddogmedia&utm_medium=jobboard&utm_campaign=Birddogmedia_Supply_JB_Postings_nj/Desktop_CPL_All_All_Core&city_id=54&z=08854&utm_term=588582319&utm_content=. The URL is a web address for a Postmates job board entitled “Deliver with Postmates.”²

Rogers FAC alleges a single count against Postmates, a violation of the Telephone Consumer Protection Act (“TCPA”), 42 U.S.C. § 227. Rogers brings this action on behalf of a putative class of:

All persons in the United States:

(1) who, at any time between September 6, 2015 and the present, were sent at least one text message to a number assigned to a cellular telephone service by Postmates, Inc., either directly or indirectly by one or more intermediary or intermediaries acting as its agent(s) or sub-agent(s), that contained a hyperlink which, if accessed, would have redirected to a URL that included (inter alia) the following text in its address: “postmates.com/?utm_source=birddogmedia”;

and

(2) for whom Postmates, Inc. lacks any record of such recipient, prior

¹ The hyperlink does not now direct to a functioning webpage.

² The FAC references the URL but does not reference material found on the webpage for the URL. “A court may, however, consider certain materials -- documents attached to the complaint, documents incorporated by reference in the complaint, or matters of judicial notice -- without converting the motion to dismiss into a motion for summary judgment. . . . Even if a document is not attached to a complaint, it may be incorporated by reference into a complaint if the plaintiff refers extensively to the document or the document forms the basis of the plaintiff’s claim.” *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003).

1 to being sent such text message, having provided to Postmates, Inc.
2 (or to any agent or sub-agent of Postmates, Inc. disclosed to such
3 person as being affiliated with Postmates, Inc.) the telephone number
4 to which such message was sent.

5 *Id.* ¶ 31. Postmates now moves to dismiss the FAC.

6 **III. LEGAL STANDARD**

7 A complaint must contain a “short and plain statement of the claim showing that the
8 pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2). To survive a Rule 12(b)(6) motion to
9 dismiss, a complaint must plead “enough facts to state a claim to relief that is plausible on its
10 face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). Plausibility does not mean
11 probability, but it requires “more than a sheer possibility that a defendant has acted unlawfully.”
12 *Ashcroft v. Iqbal*, 556 U.S. 662, 687 (2009). A complaint must provide a defendant with “fair
13 notice” of the claims against it and the grounds for relief. *Twombly*, 550 U.S. at 555 (quotations
14 and citation omitted); Fed. R. Civ. P. 8(a)(2) (A complaint must contain a “short and plain
15 statement of the claim showing that the pleader is entitled to relief.”). In considering a motion to
16 dismiss, a court accepts factual allegations in the complaint as true and construes the pleadings in
17 the light most favorable to the nonmoving party. *Manzarek v. St. Paul Fire & Marine Ins. Co.*,
18 519 F.3d 1025, 1031 (9th Cir. 2008); *Erickson v. Pardus*, 551 U.S. 89, 93-94 (2007). However,
19 “the tenet that a court must accept a complaint’s allegations as true is inapplicable to threadbare
recitals of a cause of action’s elements, supported by mere conclusory statements.” *Iqbal*, 556
U.S. at 678.

20 If a Rule 12(b)(6) motion is granted, a “court should grant leave to amend even if no
21 request to amend the pleading was made, unless it determines that the pleading could not possibly
22 be cured by the allegation of other facts.” *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000) (en
23 banc) (citations and quotations omitted). However, a court “may exercise its discretion to deny
24 leave to amend due to ‘undue delay, bad faith or dilatory motive on part of the movant, repeated
25 failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing
26 party . . . , [and] futility of amendment.’” *Carvalho v. Equifax Info. Servs., LLC*, 629 F.3d 876,
27 892-93 (9th Cir. 2010) (alterations in original) (quoting *Foman v. Davis*, 371 U.S. 178, 182
28 (1962)).

IV. DISCUSSION

The TCPA makes it “unlawful for any person within the United States, or any person outside the United States if the recipient is within the United States . . . to make any call . . . using any automatic telephone dialing system [(“ATDS”)] or an artificial or prerecorded voice to any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call” 47 U.S.C. § 227(b)(1)(A)(iii). An ATDS is “equipment which has the capacity to store or produce telephone numbers to be called, using a random or sequential number generator and to dial such numbers.” § 227(a)(1). To properly plead a TCPA claim, a plaintiff must allege that (1) the defendant called or texted a cellular telephone number; (2) using an ATDS; (3) without the recipient’s prior express consent. *See Meyer v. Portfolio Recovery Assocs., LLC*, 707 F.3d 1036, 1043 (9th Cir. 2012) (citing 47 U.S.C. § 227(b)(1)); *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 954 (9th Cir. 2009) (“[A] text message is a ‘call’ within the TCPA.”).

Postmates argues that Rogers FAC fails because he has failed to plausibly plead that Postmates is directly or vicariously liable for the alleged violation of the TCPA. The Court agrees.

A. Direct Liability

“To ‘make’ a call under the TCPA,” and thus become liable, “the person must either (1) directly make the call, or (2) have an agency relationship with the person who made the call.” *Ewing v. Encor Solar, LLC*, 2019 WL 277386, at *6 (S.D. Cal. Jan. 22, 2019) (citing *Gomez v. Campbell-Ewald, Co.*, 768 F.3d 871, 877-79 (9th Cir. 2014)). Rogers has made only a conclusory allegation that Postmates was directly involved in transmitting the April 8, 2019 text to him, and even then, he alleges that Postmates “by itself or through an intermediary or intermediaries” “transmitted or caused to be transmitted” the message. FAC ¶ 12; *see also id.* ¶ 13 (the number from which the text message was sent “is owned and operated by Defendant or by one or more agent(s) or subagent(s) on its behalf”). But no facts he has alleged support a plausible inference that Postmates itself sent the text. Indeed, Rogers seems to concede as much in his Response. He

1 explains, “Plaintiff received one of the text messages at issue as part of a marketing campaign
2 *conducted on Defendant’s behalf by its agent Bird Dog.* As explained above, *Bird Dog was acting*
3 pursuant to the Defendant’s ‘control and direction’ in promoting its courier service” Resp. 4
4 (emphasis added), ECF No. 30. And indeed, the URL to which Rogers was directed has
5 “birddogmedia” as an Urchin Tracking Module (“UTM”) source, and
6 “birddogmedia_supply_JB_Postings” as a UTM campaign, which suggests that Bird Dog Media—
7 whatever that entity is—was directing things.

8 Thus, the FAC fails to plausibly allege that Postmates directly sent or was involved in
9 transmitting the text to Rogers.

10 **B. Vicarious Liability**

11 Since Rogers’ FAC alleges no facts giving rise to a plausible inference that Postmates
12 directly sent the text at issue, his complaint rises or falls depending on whether it plausibly alleges
13 that Postmates had an agency relationship with the person or entity who did. If it does not, Rogers
14 has no viable claim under a theory of vicarious liability.

15 “Agency is the fiduciary relationship that arises when one person (a ‘principal’) manifests
16 assent to another person (an ‘agent’) that the agent shall act on the principal’s behalf and subject to
17 the principal’s control, and the agent manifests assent or otherwise consents to so act.” *Jones v.*
18 *Royal Admin. Servs.*, 887 F.3d 443, 448 (9th Cir. 2008) (discussing agency in the context of a
19 TCPA lawsuit) (quoting *Mavrix Photographs, LLC v. LiveJournal, Inc.*, 873 F.3d 1045, 1054 (9th
20 Cir. 2017) (quoting Restatement (Third) Of Agency (the “Restatement”) § 1.01 (Am. Law Inst.
21 2006))). “For an agency relationship to exist, *an agent must have authority to act on behalf of the*
22 *principal and [t]he person represented [must have] a right to control the actions of the agent.”*
23 *Mavrix*, 873 F.3d at 1054 (emphasis added) (quoting Restatement § 1.01 cmt. c).

24 Rogers FAC does not clearly allege what relationship, if any, he believes the sender of the
25 text had with Postmates. For example, he alleges that “Defendant, either directly or through one
26 or more agent(s) or sub-agent(s) acting on its behalf and pursuant to its control and direction,
27 retained Bird Dog Media, LLC and/or one or more other such agent(s) or sub-agent(s) to acquire,
28 receive, and store lists of telephone numbers to be dialed on Defendant’s behalf[.]” FAC ¶ 17.

1 And he alleges that, “Defendant, either directly or through one or more intermediaries acting as its
2 agent(s) or sub-agent(s), including Bird Dog Media, LLC, utilized an [ATDS] to transmit the
3 subject text” *Id.* ¶ 24. Those sorts of nebulous allegations do not support a plausible
4 inference that Postmates exercised any control over the sender of the text necessary to establish an
5 agency relationship.³ See *Canary v. Youngevity Int’l, Inc.*, 2019 WL 1275343, at *6 (N.D. Cal.
6 Mar. 20, 2019) (“Lacking, however, are sufficient factual allegations to plead that Youngevity
7 exercised control over the specific contents of the March 15 call advertising DAC. Even if Canary
8 had alleged such facts, control over the content of an advertising call, without more, is insufficient
9 to plead vicarious liability.”); *Ewing v. Encor Solar, LLC*, 2019 WL 277386, at *7 (S.D. Cal. Jan.
10 22, 2019) (“The FAC does not meet these pleading standards, instead offering confusing
11 allegations regarding the role each of the defendants played in the purported scheme, often using
12 defendants’ names interchangeably and switching the theory of control. . . . Such allegations are
13 insufficient to establish vicarious liability. Plaintiff has failed to plead any facts in support of his
14 conclusory allegations that Encor exercised any control over the other defendants allegedly
15 making the calls to Ewing to establish an agency relationship between them and Encor.”); *Thomas*
16 v. *Taco Bell Corp.*, 879 F. Supp. 2d 1079, 1084 (C.D. Cal. 2012), *aff’d*, 582 F. App’x 678 (9th Cir.
17 2014) (“To succeed on this [TCPA] vicarious liability theory, Ms. Thomas must demonstrate that
18 these entities acted as an agent of Taco Bell: that Taco Bell controlled or had the right to control
19 them and, more specifically, the manner and means of the text message campaign they
20 conducted.”) (citing *United States v. Bonds*, 608 F.3d 495, 506 (9th Cir. 2010). They amount to
21 mere speculation, and “[f]actual allegations must be enough to raise a right to relief above the
22 speculative level” *Twombly*, 550 U.S. at 555 (citation omitted); *Iqbal*, 556 U.S. at 678 (“The
23 plausibility standard is not akin to a ‘probability requirement,’ but it asks for more than a sheer
24 possibility”) (citation omitted).

25 In his Response, Rogers directs the Court to a 2013 FCC Ruling finding that “vicarious
26

27 ³ Even if Postmates had hired Bird Dog Media to advertise on its behalf, there are no factual
28 allegations in the FAC plausibly suggesting Postmates hired the sender of the text to do its bidding
or controlled it. An allegation that Postmates hired Bird Dog Media would at best suggest the
sender of the text was one layer removed from Postmates and its control.

1 seller liability under federal common law agency principles is also available for violations of
2 section 227(b).” *In re DISH Network, LLC*, 28 FCC Rcd 6574, 6592. In that Ruling, the FCC
3 provided “examples of evidence that may demonstrate that [a third party] is the seller’s authorized
4 representative with apparent authority to make the seller vicariously liable for the [third party’s]
5 section 227(b) violations.” But the FAC does not plausibly allege any of those circumstances are
6 present here. For instance, Rogers points to the FCC’s finding that, “apparent authority may be
7 supported by evidence that the seller allows the outside sales entity access to information and
8 systems that normally would be within the seller’s exclusive control, including: access to detailed
9 information regarding the nature and pricing of the seller’s products and services or to the seller’s
10 customer information.” *Id.* at 6592. But Rogers has alleged no facts plausibly suggesting that the
11 sender of the text had access to any information or systems exclusively within Postmates’ control
12 (in fact, his FAC doesn’t even make conclusory allegations to that effect). In his Response, he
13 points out that the text contained information about an hourly pay rate (“Make 25 hourly”) and a
14 specific geographic area (“delivery in Fort Lauderdale”), but that type of information can easily be
15 found, or simply made up. One needs only download and open the Postmates app to discern
16 whether it delivers in a specific area and thus might be hiring drivers. And the Postmates website
17 allows anyone to search restaurants at locations Postmates serves (Ft. Lauderdale shows up as one
18 of them). *See* <https://postmates.com/delivery-near-me> (last visited February 26, 2020). Nor is the
19 fact that the link in the text directed to the Postmates website proof that the sender had access to
20 Postmates’ “information and systems.” A quick internet search or scroll to the bottom of
21 Postmates homepage can take a would-be fleet member to the relevant webpage.

22 Returning to the FCC ruling, Rogers notes that the FCC stated that “authority to use the
23 seller’s trade name, trademark and service mark may also be relevant” in determining whether a
24 third-party had apparent authority. *Id.* at 6592. But Rogers’ FAC contains no factual allegations
25 plausibly suggesting that the sender of the text was given authority by Postmates to use Postmates’
26 name.

27 Finally, Rogers points out that the FCC found that, “a seller would be responsible under
28 the TCPA for the unauthorized conduct of a third-party telemarketer that is otherwise authorized

1 to market on the seller’s behalf if the seller knew (or reasonably should have known) that the
2 telemarketer was violating the TCPA on the seller’s behalf and the seller failed to take effective
3 steps within its power to force the telemarketer to cease that conduct.” *Id.*; *see also* Restatement §
4 4.01 (“[K]nowing acceptance of the benefit of a transaction ratifies the act of entering into the
5 transaction.”). Rogers cites the FCC’s finding but omits from it the language “for the
6 unauthorized conduct of *a third-party telemarketer that is otherwise authorized to market on the*
7 *seller’s behalf;*” and for good reason: the FAC contains no factual allegations raising a plausible
8 inference that the sender of the text was authorized by Postmates to market on its behalf.
9 Additionally, even if the sender was authorized to market on Postmates’ behalf, there are no
10 factual allegations suggesting that Postmates knew or reasonably should have known that the
11 sender of the text or any of its agents or sub-agents were violating the TCPA on its behalf. Rogers
12 argues that, “the website link incorporated within the text message sent on Postmates behalf
13 directed recipients directly to Postmates’ website, such that Postmates would have been aware of
14 where visitors to its website were being directed from and that they were mobile telephone users.”
15 Resp. at 6. “In that same thread,” Rogers argues, “Postmates accepted the benefit from these text
16 messages” and thus ratified the sender’s conduct. However, Rogers pleads no factual allegations
17 to buttress that conclusion. The Postmates’ webpage at issue can be found and accessed by a very
18 basic navigation of Postmates’ website, such that anyone with access to the internet can reach the
19 webpage with relative ease. There’s no allegation that Postmates examined tracking codes and
20 would have been aware of which particular applicants were directed to its website by whoever sent
21 Rogers his text (if in fact there were any, which Rogers has also not alleged). Lastly, Rogers
22 alleges that Defendant “had actual or constructive knowledge” that class members’ phone numbers
23 were acquired without notice that they would be sent autodialed text messages. But that allegation
24 is not supported by factual allegations, and the Court is “not bound to accept as true a legal
25 conclusion couched as a factual allegation.” *Iqbal*, 556 U.S. at 678. And a principal only ratifies
26 the action of an agent if it *knowingly* accepts the benefits of the transaction. *Abante Rooter &*
27 *Plumbing, Inc. v. Alarm.com Inc.*, 2018 WL 3707283, at *4 (N.D. Cal. Aug. 3, 2018) (citing
28 Restatement § 4.01 cmt. d (“knowing acceptance of the benefit of a transaction ratifies the act of

1 entering into the transaction”)); *W. All. Bank v. Jefferson*, 2015 WL 7075171, at *7 (D. Ariz. Nov.
2 13, 2015), *aff’d*, 698 F. App’x 914 (9th Cir. 2017) (citing the Restatement § 4.01 cmt. b (“The
3 principal is not bound by a ratification made without knowledge of material facts about the agent’s
4 act unless the principal chose to ratify with awareness that such knowledge was lacking.”)). Thus,
5 Rogers has not plausibly alleged that Postmates ratified the sender’s actions.

6 Rogers relies on *Shuckett v. DialAmerica Mktg. Inc.*, 2019 WL 913174 (S.D. Cal. Feb. 22,
7 2019), but that case is not on point. There, the court concluded that the plaintiff had plausibly
8 alleged that the company for whom a third-party had made telemarketing calls exerted some
9 degree of control over the third party. *Id.* at * 3-4. But there, the company had a contract with the
10 third party. Here, there isn’t any clear allegation that Postmates had an agreement with the sender
11 of the text. Instead, Rogers alleges that Postmates, “either directly or through one or more
12 agent(s) or sub-agent(s) acting on its behalf . . . retained Bird Dog Media, LLC and/or one or
13 more other such agent(s) or sub-agent(s)” FAC ¶ 17 (emphasis added). This is not enough
14 to plausibly allege that Postmates was vicariously liable.

15 Nor is *Abante Rooter & Plumbing, Inc. v. Alarm.com Inc.*, 2018 WL 3707283 (N.D. Cal.
16 Aug. 3, 2018) of much use to Rogers. Rogers argues that the court there “found that evidence of
17 many of the same allegations that Plaintiff raises here was sufficient to overcome a motion for
18 summary judgment on the issue of the defendant’s liability for text messages sent on its behalf.”
19 Resp. 7 (citing *id.* at 5). But as Rogers himself acknowledges, that order concerned cross-motions
20 for summary judgment, not a motion to dismiss, and there the plaintiffs had produced evidence
21 “that [the defendant] knew of [its third party’s] allegedly illegal telemarketing conduct and
22 accepted the benefits therefrom.” 2018 WL 3707283, at * 5. The court found that the plaintiffs
23 had thus “presented evidence, which when viewed in a light most favorable to their case, suggests
24 that a reasonable jury may return a verdict finding that [defendant] is vicariously liable for the
25 telemarketing calls at issue based on a ratification theory.” *Id.* Rogers has not produced evidence
26 that Postmates knew or reasonably should have known of any conduct by the sender of the text
27 which violated the TCPA. Of course, he is not required to at this stage, but nor can he make it
28 through a challenge to the pleadings armed with nothing more than conclusory allegations and

1 speculation. *See Iqbal*, 556 U.S. at 678-79 (“Rule 8 marks a notable and generous departure from
2 the hypertechnical, code-pleading regime of a prior era, but it does not unlock the doors of
3 discovery for a plaintiff armed with nothing more than conclusions.”).

4 The Court finds dismissal is appropriate.

5 **V. CONCLUSION**

6 For the reasons stated above, the Court **GRANTS** Defendant’s Motion to Dismiss and
7 dismisses with leave to amend Plaintiff’s First Amended Class Action Complaint.

8 **IT IS SO ORDERED.**

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10 Dated: March 3, 2020



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12 THOMAS S. HIXSON
13 United States Magistrate Judge
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